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No. 429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No. ———

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, pray that a writ of certiorari issue to review the order of the United States Court of Claims entered in the above-entitled case on May 13, 1966.

OPINIONS BELOW

The first opinion of the Court of Claims, rendered July 17, 1964, Appendix E hereto, p. 20, is reported at 167 Ct.Cls. 405. The next opinion in the litigation, that of an Order of a Commissioner of the Court of Claims, entered August 24, 1965, is unreported and is printed as Ap-

pendix F hereto, p. 22. The second opinion of the Court of Claims, rendered May 13, 1966, Appendix G hereto, p. 29, is as yet unreported.

JURISDICTION

The order of the Court of Claims was entered on May 13, 1966. Jurisdiction of this Court is invoked under Sec. 1 of a special jurisdictional act, the Act of July 30, 1946, 60 Stat. 715, Appendix A hereto, p. 12, and 28 U.S.C. § 1255.

QUESTIONS PRESENTED

I

Can the United States escape the just compensation requirements of the Fifth Amendment by taking property, converting the same to cash and depositing it to the landowner's credit in the Treasury, and then appropriating to itself part of the proceeds so deposited?

II

Can the United States by its own wrongful act avoid a continuing statutory obligation to pay interest on the proceeds of sales of Indian trust lands deposited in the Treasury by making unlawful deductions from the proceeds (principal) account?

TREATY AND STATUTES INVOLVED

Act of July 30, 1946, 60 Stat. 715, Appendix A, p. 12.

Treaty of Hell Gate, July 16, 1855, 12 Stat. 975, Article II, Appendix B, p. 16.

Act of April 1, 1880, 21 Stat. 70, 25 U.S.C. § 161, Appendix C, p. 18.

Act of April 23, 1904, 33 Stat. 305, § 14, Appendix D, p. 19.

STATEMENT OF THE CASE

By the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975, ratified March 8, 1859, petitioners ceded their aboriginally-owned lands to respondent, but reserved from their grant a large tract for their exclusive future home. Article II of the Treaty provides:

> "All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon said reservation without permission of said confederated tribes, and the superintendent and the agent. . . ."[1]

Petitioners' members moved onto their reservation and husbanded this last natural resource of their former vast domain with care and skill.[2] Hunting and fishing were bountiful and tribal members raised immense herds of goats, horses and cattle, some of the latter numbering 3,000 head. The Indians lived in contentment and security, now satisfied with their way of life, and prospering in it. Their reservation was a natural paradise.[3] But the white man, whose greed for land could not be satiated, cast covetous eyes on their lush reservation lands. Thereafter, respondent commenced negotiating with petitioners, seeking a cession of at least a portion of their lands

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[1] The Treaty of Hell Gate has not been denounced by the United States. The full text of Article II is Appendix B hereto, p. 16.

[2] The Indian Claims Commission determined petitioners ceded to defendant 12,005,000 acres of land. 16 Ind.Cl.Comm. 1.

[3] This characterization and the previous references to the reservation are taken from the testimony of aged Indian witnesses before a Commissioner of the Court of Claims at a hearing in Missoula, Montana, September 14, 1965, contained in the certified record filed with this Court. See testimony of Mrs. Burgess, Tr. 19-38; Mrs. Niles, 38-41; Mrs. McEldery, 42-45; Mr. Sloan, 48-51; Mr. Phillips, Tr. 54-55.

earlier promised and secured to them by the Hell Gate Treaty as an exclusive reservation in perpetuity. Over the years, petitioners resisted the entreaties and blandishments of respondent's agents and would not consent to giving up any of their reservation; but respondent would brook no frustration of its designs, so notwithstanding its solemn treaty it forced petitioners' members to settle on minute allotments of 80 to 120 acres, thus forcing the sale of their former immense herds of goats, horses and cattle, impairing their hunting and fishing rights, and transforming petitioners from a prosperous nation into a collection of common dirt-farmers and landed poor.[4] All of this was pursuant to the Act of April 23, 1904, 33 Stat. 305, which further provided that all unallotted land (which was most of the reservation) would be sold by respondent, with the proceeds credited to petitioners' trust account in the Treasury. From the proceeds so deposited, as authorized by Section 14 of the Act,[5] respondent deducted the very costs it had incurred in violating the treaty, costs amounting to $190,399.97, representing expenses incurred in surveying and classifying the reservation so that respondent could force allotments on petitioners and then open the once sacrosanct treaty lands to white entry and exploitation, this notwithstanding the treaty had expressly stated the *United States* would survey the reservation (Art. II).

Petitioners claimed the taking of their moneys to pay respondent's expenses violated the Treaty of Hell Gate and was a wrongful appropriation of their property for which respondent was liable.

The Court of Claims agreed.[6] Thereafter, petitioners sought entry of a judgment awarding interest on the

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[4] See testimony of aged Indian witnesses cited in note 3, *supra*.

[5] Appendix D hereto, p. 19.

[6] Opinion of July 17, 1964, 167 Ct.Cls. 405, Appendix E hereto, p. 20.

moneys from the dates appropriated as a measure of just compensation, pointing out the funds represented reservation property taken in violation of the treaty and converted into cash, which, in turn, was deposited in petitioners' Treasury-trust account, and that respondent's taking was therefore a taking of property within the purview of the Fifth Amendment to the Constitution. In the alternate, petitioners claimed interest under the authority of the Act of April 1, 1880, 21 Stat. 70, 25 U.S.C. § 161 (which provides that the proceeds of all sales of tribal trust property shall be deposited in the Treasury to bear interest at the specified rate), and that the money taken represented such proceeds; and since respondent's taking was unlawful, as found by the Court, it follows that respondent must now pay petitioner the interest the funds would have earned had defendant not violated its trust duty and breached the treaty.

The Commissioner for the Court of Claims denied the just-compensation claim for interest, holding the property (money) was not taken by respondent and instead the claim was analogous to a breach-of-contract claim against the government based on a failure to pay sums agreed to by contract in which situation interest is not permitted.[7] The Commissioner did not deal with the alternate statutory basis for interest.

The Court of Claims affirmed the Commissioner.[8] On the just-compensation issue the Court echoed his opinion, characterizing the suit as not a taking of property under the Fifth Amendment, but a taking away of contractual rights by a breach of the contract. As to the fact respondent actually took petitioners' funds, the Court denied Fifth Amendment protection by noting that legal title to the moneys was in respondent and at most peti-

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[7] Order of August 24, 1965, unreported, Appendix F hereto, p. 22.

[8] Opinion of May 13, 1966, as yet unreported, Appendix G hereto, p. 29.

tioners held a beneficial interest and the taking by respondent was a breach of trust obligation and not a taking of property. Finally, as if not certain of its prior reasons, the Court equated petitioners' funds with appropriated moneys and correctly noted an unwarranted deduction by respondent from its own money appropriated for petitioners' benefit would not be subject to a just-compensation claim under the Fifth Amendment.

As to the alternate claim for interest, under the Act of April 1, 1880, the Court denied recovery on a theory never before advanced. In the Court's opinion the Act of April 1, 1880, was modified *pro tanto* by the Act of April 23, 1904, as to the proceeds involved.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims conflicts with the decisions of this Court and with its own decisions.

a. Decisions of this Court: In *United States* v. *Creek Nation*, 295 U.S. 103 (1935), the United States excluded lands from the Creek Reservation by erroneous survey; it compounded this error by disposing of the land by allotments to other Indians and patents to settlers. It deposited the proceeds in the Treasury. Subsequently, when notified it had disposed of land belonging to the Creek Nation, it took no action to rescind the allotments or patents. This Court held the disposition by the United States to involve an implied undertaking by it to make just compensation to the tribe.[9] It is precisely so here. Petitioners' property was disposed of to third persons by the United States in violation of its treaty and to petitioners' detriment; and certainly the respondent did so on an implied undertaking to pay just compensation. It then took the proceeds of the disposition sales and credited them to

[9] *Accord, Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476. (1937).

petitioners' Treasury account. Thereafter, it debited that account for the very expenses it incurred in disposing of the lands in violation of the treaty. This was just as much a taking for which just compensation is due, as if, instead of depositing the proceeds and then taking them, respondent had taken a portion of petitioners' reservation lands equivalent in value to the money taken and held it as payment for its expenses. For such a taking, under *United States* v. *Creek Nation*, *supra*, and *Shoshone Tribe of Indians* v. *United States*, *supra*, respondent would be liable for just compensation.

The Court of Claims' denial of a taking and denial of an award of just compensation was on the following theory:

> ". . . The gravamen of our ruling was that, by passing the 1904 Act, Congress violated the United States' obligations and the plaintiffs' rights under the 1855 treaty. This was a breach of an agreement—and the court's reference to 'thus taking rights away from plaintiffs' was directly connected with the holding that the treaty-agreement's provisions had been broken. The taking away of *contractual rights*, via a rupture of the contract, is of course not equivalent to a taking of *property* under the Fifth Amendment." [10]

The fallacy of the Court's position cannot be concealed by its semantics. The undeniable fact is petitioners' property was taken from them by the sovereign as part of a statutory scheme (the Act of April 23, 1904) deemed to be in the public interest. Certainly, by merely converting the property, which itself amounted to a taking, and then appropriating it to its own use, the United States cannot avoid the constitutional requirement of making just compensation. Furthermore, when respondent seized petitioners' moneys the moneys themselves were *property*—as

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[10] Opinion of May 13, 1966, Appendix G hereto, at pp. 31-32.

any convicted embezzler could attest. The Fifth Amendment's protection of property is not limited to nonmoney property.

The decision of the Court of Claims as it now stands conflicts with the requirements of the Fifth Amendment and conflicts with the prior decisions of this Court.

b. Decisions of the Court of Claims: The decisions of the Court of Claims conflict with prior decisions of that Court. *Cf. Creek Nation* v. *United States*, 84 C.Cls. 12, 16, *aff'd.*, 302 U.S. 620, 622; *Shoshone Tribe of Indians* v. *United States*, 85 C.Cls. 331, *aff'd.*, 304 U.S. 111; *Uintah and White River Bands of Ute Indians* v. *United States*, 139 C.Cls. 1.

Where the decision of the Court below is in conflict with its earlier determinations, the conflicts should be treated as equivalent to a conflict between circuits. This situation is similar to that of *Compagnie Generale Transatlantique* v. *Elting*, 298 U.S. 217. As Robertson & Kirkham, *Jurisdiction Supreme Court of the United States*, say (1st ed. § 306, p. 619)—

> "Conflict or inconsistency between decisions of the same Circuit Court of Appeals ordinarily is not a ground for a writ, since the later in point of time is controlling. However, the writ was granted on the ground in Conpagnie [sic] Generale Transatlansique v. Elting, where there were the following special circumstances: The question related to the construction of a provision of the Immigration Act. Prior decisions of the Circuit Court of Appeals for the Second Circuit had established a particular construction in that circuit, in which the government had acquiesced after the Supreme Court had refused to grant a certiorari to review one of those decisions. Subsequently, in the Compagnie Generale Transatlantique Case, the Circuit Court of Appeals for the Second Circuit made a right about face on this question of construction without mentioning or attempting to distinguish its

prior decisions. The Supreme Court granted certiorari and reversed. It may be noted that the immigration question involved was one arising more often in the Second Circuit than elsewhere."

2. The decision of the Court of Claims on the statutory basis for interest is based on a repeal by implication and permits the respondent-trustee to profit at its wards' expense by its own wrongful act.

The Act of April 1, 1880,[11] was enacted by respondent and provides that if Indian trust lands are sold, the proceeds shall be deposited in the Treasury of the United States to the credit of respondent's wards, to draw interest at the rate prescribed by law. Petitioners had trust property under the Treaty of Hell Gate, which was guaranteed to them in perpetuity. Respondent breached the treaty by selling most of the trust lands, without the consent of petitioners and over their anguished objections. Thereafter, respondent took from petitioners' Treasury account, out of the proceeds of the reservation lands so sold, the expenses it had incurred in breaching the treaty. The Court of Claims in its first decision held this taking to be unwarranted and a wrongful act by defendant. The court subsequently contradicted its first decision, although purporting to affirm it. It held that while the taking was unlawful, a wrongful act, and therefore should not have occurred, the fact that it did precludes any award of interest pursuant to the Act of April 1, 1880, even though had respondent's wrongful act not occurred, interest would have been earned for petitioners under that act. The court stated:

". . . We cannot accept this argument, appealing though it is, because the 1904 statute must be read as a *pro tanto* modification of the provisions of the 1880 Act requiring the deposit of *'all* sums' received

[11] Appendix C hereto, p. 18.

> on account of sales of Indian trust lands' (emphasis added). When Congress said, in 1904, that the sale proceeds should be devoted to Indian purposes *after* deduction of the survey expenses, Congress necessarily changed the prior requirement of the 1880 law and directed that interest not accrue on the amounts assignable to those costs. This was a Congressional change, not a mere executive or administrative order, and the 1880 provision could no longer be given full effect." (Footnote omitted).[12]

The Court denies recovery by holding Section 14 of the Act of April 23, 1904,[13] impliedly repealed the Act of April 1, 1880, although repeals by implication are not favored, *Silver* v. *New York Stock Exchange*, 373 U.S. 341; and here the repeal found by the court in effect is by implication on an implication, for it first must be implied that Congress intended to deal with interest, and then that it impliedly repealed the earlier Act. Respondent's counsel did not assert repeal by implication and the Court of Claims' reliance on it is untenable—contrary not only to the rule that such repeals are not favored, but to the principle that one will not be permitted to profit from his own wrong. In *Deitrick* v. *Greaney*, 309 U.S. 190, 196, this Court held:

> "It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have participated in it, to support his own asserted legal title or to defeat a remedy which except for his misconduct would not be available. . . ."

That principle is acutely appropriate here, for the United States *qua* trustee of Indian moneys should "be judged by the most exacting fiduciary standards." *Seminole Nation* v. *United States*, 316 U.S. 286, 297.

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[12] Opinion of May 13, 1966, Appendix hereto, at p. 34.

[13] Appendix D hereto, p. 19.

The Court of Claims is manifestly wrong in denying recovery to respondent's wards on a theory at odds with accepted legal and equitable principles established by prior decisions of this Court and at odds with the trustee-ward relationship.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN W. CRAGUN
RICHARD A. BAENEN
Counsel for Petitioners

APPENDIX A

Act of July 30, 1946, 60 Stat. 715

Conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, and render judgment in any and all claims which the Confederated Salish and Kootenai Tribes of Indians of the Flathead Reservation in Montana, or any tribe or band thereof, may have against the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims, subject to review by the Supreme Court of the United States on writ of ceritorari as in other cases, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims of whatsoever nature which the Confederated Salish and Kootenai Tribes of Indians of the Flathead Reservation of Montana, or any tribe or band thereof, may have against the United States.

SEC. 2. That suit or suits under this Act may be instituted by the Confederated Salish and Kootenai Tribes of Indians, or any tribe or band thereof, either separately or jointly, as party or parties plaintiff, against the United States as party defendant, by filing within five years after the approval of this Act a petition or petitions in the Court of Claims and serving with respect to each suit a copy thereof on the Attorney General of the United States, who, either in person or by some attorney from the Department of Justice to be designated by him, shall appear and defend the interests of the United States. Such petition or petitions shall set forth the facts upon which the claim or claims is or are based and shall be verified by the attorney or attorneys employed by said Indians, under contract approved in accordance with existing law, to prosecute said claims, which may be made upon infor-

mation and belief, and no other verification shall be necessary. The petition or petitions shall be subject to amendment at any time prior to final submission of the case to the Court of Claims. Such petition or petitions may, in addition to alleging specific claims, demand a general accounting of all funds and property expended or used by the United States for the account of said Indians, in which event the General Accounting Office shall within a reasonable time from date of filing said petition or petitions make a complete audit of said accounts, and, in addition to the usual copies furnished the Attorney General, shall furnish a copy thereof to the attorney or attorneys for said Indians; and the court, after full hearing, shall state the account and render judgment in accordance therewith.

SEC. 3. That at the trial of any suit instituted hereunder the court shall settle and determine the rights therein, both legal and equitable, of said Indians against the United States, notwithstanding lapse of time or statutes of limitation. In the determination of the validity of any claim asserted or defense interposed hereunder, the court shall have the full power and authority of a court of equity.

SEC. 4. That the court shall have authority, by proper orders and process, to make parties to any suit or suits instituted hereunder any other tribe, band, or group of Indians deemed by it necessary or proper to a final determination of the matters in controversy.

SEC. 5. That in any suit instituted hereunder any letter, paper, document, map, or record in the possession of any officer or department of the United States (or certified copies thereof) may be used in evidence, and the departments of the Government of the United States shall give full and free access to the attorney or attorneys for said Indians to such letters, papers, documents, maps, or records as may be useful to said attorney or attorneys

in the preparation for trial or trials of such suit or suits.

SEC. 6. That no payment or payments which have been made by the United States upon any claim or claims asserted in any suit brought hereunder, or expended for any of the said Indians, shall operate as an estoppel against any suit brought hereunder, but there shall be set off against any recovery obtained by said Indians hereunder any payment made by the United States on any claim asserted by said Indians, together with such gratuity expenditures as are directed to be set off by the Act of Congress, approved August 12, 1935 (49 Stat. 596): *Provided*, That no moneys expended for the benefit of said Indians under the Wheeler-Howard Act, approved June 18, 1934 (48 Stat. 984), shall be applicable as set-offs.

SEC. 7. That upon the final determination of any suit or suits instituted hereunder, the Court of Claims, in the event of judgment for said Indians, shall determine such fees or compensation to be paid the attorney or attorneys as said court shall find reasonable or equitable, and in addition thereto such actual and necessary expenses as shall have been incurred by the attorney or attorneys in the prosecution of said claims. In no case shall the fees or compensation decreed by said Court of Claims be in excess of the amount stipulated in the contract or contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and in no event to exceed 10 per centum of the amount of the recovery, and shall be paid out of any money appropriated by Congress for the benefit of said Indians pursuant to any judgment hereunder.

SEC. 8. That the amount of any judgment recovered for said Indians, less attorneys' fees and expenses, shall be placed to the credit of said Indians in the Treasury of the United States and shall draw interest at the rate

of 4 per centum per annum from date of judgment and shall thereafter be subject to appropriation by Congress and used for the benefit of said Indians, including, but without limitations, the purchase of lands, livestock, farming implements, erection of buildings and improvements, and for productive enterprises, with the approval of the Secretary of the Interior and consent of said Indians.

Approved July 30, 1946.

APPENDIX B

Treaty of Hell Gate, July 16, 1855, 12 Stat. 975, Article II

Article II There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation, upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead Nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse Prairies; thence northerly to, and along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent. And the said confederated tribes agree to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual

claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing however the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. *And provided*, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid.

APPENDIX C

U.S. Code, Title 25

"§ *161. Deposit in Treasury of trust funds*

"The Secretary of the Interior is authorized to deposit, in the Treasury of the United States, any and all sums held by him on April 1, 1880, or which may be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds, or other stocks and securities belonging to the Indian trust fund, and *all sums received on account of sales of Indian trust lands*, and the sales of stocks lately purchased for temporary investment, whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments; and the United States shall pay interest semi-annually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress. (Apr. 1, 1880, ch. 41, 21 Stat. 70.)" (Italics added.)

APPENDIX D

Act of April 23, 1904, 33 Stat. 305, Section 14.

SEC. 14. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect.

APPENDIX E

IN THE UNITED STATES COURT OF CLAIMS

No. 50233

(Decided July 17, 1964)

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA

v.

THE UNITED STATES

Richard A. Baenen for plaintiffs. *John W. Cragun* and *Wilkinson, Cragun & Barker* were on the briefs.

John D. Sullivan, with whom was *Assistant Attorney General Ramsey Clark*, for defendant.

Before JONES, *Senior Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

ON DEFENDANT'S AND PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

PER CURIAM: This case is now submitted to the court after oral argument by counsel on motions for summary judgment by defendant and plaintiffs with respect to the claim set forth in paragraph 11 of the petition which reads as follows:

> "The defendant wrongfully and unlawfully appropriated, used and expended several hundred thousand dollars of plaintiff's funds to pay the expenses of sur-

vey, classification, appraisal and opening of the reservation lands pursuant to the Act of April 23, 1904 and amendments thereto, the exact amount of which is unknown to plaintiff and will be disclosed by the accounting herein prayed for. Plaintiff is entitled to judgment for damages against defendant for said amount."

Upon consideration of the oral argument of counsel and the briefs of the parties it appears that plaintiffs conveyed their lands to defendant pursuant to the Treaty of Hell Gate of July 16, 1855 (12 Stat. 975, 2 Kapp. 722), under a provision that the tract be surveyed and marked out for the exclusive use and benefit of said confederated tribes and granting the President discretion from time to time to cause the whole or a portion of the reservation to be surveyed into lots. By Act of April 23, 1904 (33 Stat. 302), it was directed that plaintiffs' reservation be surveyed at plaintiffs' expense. The survey was conducted and the expenditures and disbursements thereof, amounting to $190,399.97, were charged against the receipts from the sales of reservation lands held to be surplus. Defendant asserts that all appropriations and expenditures were made under the Act of April 23, 1904, and are lawful and proper.

The Court concludes that the surveying of plaintiffs' lands under the treaty of 1855 was to have been done at Government expense but that such surveying was never done. The Act of 1904, in requiring that the tribes bear the expense of surveying, violated the provisions of the treaty of 1855, thus taking rights away from plaintiffs. As to paragraph 11 of plaintiffs' petition, defendant's motion for summary judgment is denied, plaintiffs' motion for summary judgment is granted, and judgment is entered for plaintiffs with the amount of recovery to be determined pursuant to Rule 47(c)(2).

APPENDIX F

IN THE UNITED STATES COURT OF CLAIMS

No. 50233

(Filed August 24, 1965)

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA

v.

THE UNITED STATES

ORDER OF COMMISSIONER DENYING PLAINTIFFS' MOTION, FILED APRIL 23, 1965, TO ENTER FINDINGS OF FACT AS TO AMOUNT OF RECOVERY ON CLAIM PLEADED IN PARAGRAPH 11 OF PETITION

The issue which is presented for decision results from a motion by plaintiffs, filed April 23, 1965, to enter findings of fact and conclusions of law as to the amount of recovery under an opinion of the court of July 17, 1964, in which, as to paragraph 11 of plaintiffs' petition, defendant's motion for summary judgment was denied, plaintiffs' motion for summary judgment was granted, and judgment was entered for plaintiffs with the amount of recovery to be determined pursuant to Rule 47(c)(2).

Paragraph 11 of the petition reads as follows:

> The defendant wrongfully and unlawfully appropriated, used and expended several hundred thousand dollars of plaintiff's funds to pay the expenses of survey, classification, appraisal and opening of the

reservation lands pursuant to the Act of April 23, 1904 and amendments thereto, the exact amount of which is unknown to plaintiff and will be disclosed by the accounting herein prayed for. Plaintiff is entitled to judgment for damages against defendant for said amount.

In its opinion, the court stated:

> Upon consideration of the oral argument of counsel and the briefs of the parties it appears that plaintiffs conveyed their lands to defendant pursuant to the Treaty of Hell Gate of July 16, 1855 (12 Stat. 975, 2 Kapp. 722), under a provision that the tract be surveyed and marked out for the exclusive use and benefit of said confederated tribes and granting the President discretion from time to time to cause the whole or a portion of the reservation to be surveyed into lots. By Act of April 23, 1904 (33 Stat. 302), it was directed that plaintiffs' reservation be surveyed at plaintiffs' expense. The survey was conducted and the expenditures and disbursements thereof, amounting to $190,399.97, were charged against the receipts from the sales of reservation lands held to be surplus. Defendant asserts that all appropriations and expenditures were made under the Act of April 23, 1904, and are lawful and proper.
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> The court concludes that the surveying of plaintiffs' lands under the treaty of 1855 was to have been done at Government expense but that such surveying was never done. The Act of 1904, in requiring that the tribes bear the expense of surveying, violated the provisions of the treaty of 1855, thus *taking rights away from plaintiffs.* * * * [Emphasis added.]

Plaintiffs assert in their motion of April 23, 1965, that under the foregoing opinion of the court they are entitled to recover (before offsets, if any) not only the sum of $190,399.97, which represents the expenditures and disbursements which were charged against the receipts from the sales of reservation lands held to be surplus, but also

the sum of $453,435.96, in interest which, plaintiffs allege, defendant wrongfully took and that "this taking was a taking of property without just compensation, a violation of the Fifth Amendment." The sum of $453,435.96, is arrived at by plaintiffs by employing a rate of 5 percent per annum as interest from the date the tribal accounts were assessed with the expendtiures and disbursements until June 30, 1934, and employing a rate of 4 percent per annum as interest from July 1, 1934, until June 1, 1965.

By both case law and statute, the rule is that interest may not be recovered on a claim against the United States in the absence of a specific contractual provision or enabling statute. *Tillson* v. *United States*, 100 U.S. 43 (1879); *United States* v. *North American Transp. & Trading Co.*, 253 U.S. 330, 336 (1920). The Act of June 25, 1948, c. 646, § 1 (62 Stat. 978, 28 U.S.C. 2516(a)) provides:

> Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof.

The foregoing is, however, subject to the provision of the Fifth Amendment to the Constitution: "nor shall private property be taken for public use, without just compensation," which the courts have uniformly held includes interest as part of the just compensation. *Seaboard Air Line R. Co.* v. *United States*, 261 U.S. 299, 306 (1923); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945); *United States* v. *Lynah*, 188 U.S. 445 (1903).

The issue to be decided may be stated simply as follows: Was the "taking" of the rights away from plaintiffs, as characterized by the court in its opinion on the motions for summary judgment, a "taking" within the

meaning of the Fifth Amendment to the Constitution? If so, then, on the basis of the decided cases, interest is allowable; otherwise, since there is no "contract or Act of Congress expressly providing for payment thereof," interest is not allowable.

In the recent case of *Acme Process Equipment Co.* v. *United States*, Ct. Cl. No. 349-57, decided June 11, 1965, *loc. cit.* 39 to 41, the court rejected the demand of plaintiff therein for interest on amounts of money retained by the Government in a contract case. Plaintiff, in that case, alleged that these amounts were retained by the Government without any color of right and thus came within the circle of the Fifth Amendment's guarantee that property shall not be taken for public use without payment of just compensation. The court pointed out that plaintiff's demand was not novel in suits on Government contracts; nor, was its steadfast repudiation by the courts, as indicated by several cited cases. The court found the Government's actions to be bona fide, but in a footnote stated (*loc. cit.* 41, fn 43), "We do not reach the issue of whether there would be a taking (for which just compensation should be paid) if bad faith on the part of the defendant had been shown. * * *"[1]

In the case at bar, plaintiffs press their claim for interest by pointing not only to the language of the court characterizing the action of defendant as a "taking" of the rights of plaintiff, but also by pointing to a number of cases, involving Indian tribes, in which interest was in fact allowed as part of the measure of damages. An examination of these cases reveals, however, essentially dissimilar factual situations from the case at bar. In those "taking" cases in which interest has been allowed, the court has found that there has been a taking under the power of eminent domain. These cases are clearly dis-

[1] In the instant case, there is no issue of bad faith.

tinguished from claims based upon breach of promises made in a treaty.

In *Choctaw Nation* v. *United States*, 91 Ct.Cl. 320 (1940), *cert. denied*, 312 U.S. 695 (1941), cited by plaintiffs, an 1855 treaty with the claimants established a $500,000 trust fund to pay 5 percent annual interest for the benefit of the Nation. The Congress later breached the treaty by legislation in 1907 which reduced the amount of the interest to 3 percent. The court allowed the claimants to recover the extra 2 percent interest which had wrongfully been withheld from them in violation of the express terms of the treaty; but, the court denied recovery of additional interest on this sum as part of the damages. The court stated:

> Inasmuch, therefore, as plaintiff's right to recover this amount grows out of a contract obligation of the government and results from its failure to fulfill its obligation in that regard, no additional amount measured by interest is allowable as a part of just compensation for a taking of property under the Fifth Amendment. Failure to pay the stipulated interest (5% on the trust fund, rather than 3%) was not a taking of property under the Constitution.

The *Choctaw* case was followed and cited with approval on the issue of disallowance of interest under similar facts in *Rogue River Tribe* v. *United States*, 105 Ct.Cl. 495, 64 F. Supp. 339 (1946).

In *Loyal Band of Creek Indians* v. *United States*, 118 Ct.Cl. 373, 97 F. Supp. 426, *cert denied*, 342 U.S. 813 (1951), a treaty between the Government and the Indians provided that the United States Senate should arbitrate and determine the amount of certain outstanding claims. The Senate, acting as arbitrator, did so, and awarded the claimants $1,200,000. The House of Representatives later refused to concur in the Senate's determination and, after a joint conference, the amount of the award was reduced

to $600,000. This court held that once the arbitrator expressly named in the treaty had made its award, the property rights of the Indians became vested, and could not be destroyed by a later attempted modification. The failure of the Government to pay the extra $600,000 was found to be a departure from the requirement of "fair and honorable dealings" prescribed in the Indian Claims Commission Act, under which the claimants brought suit. On the issue of the allowability of interest, this court stated:

* * * *

> The plaintiffs claim interest on the $600,000, from the time of the Senate's determination down to date, saying that the "fair and honorable dealings" clause of Section 2 of the Indian Claims Commission Act of August 13, 1946, authorizes the award of interest. The plaintiffs say that Section 2516 (a) of Title 28, U.S. Code, revised, which forbids the allowance of interest on a claim against the United States, unless the interest is agreed to by contract or is authorized by an Act of Congress, applies only to judgments of this Court, and does not forbid the Indian Claims Commission to award interest. The Government says that Section 2516 (a) is merely declaratory of a generally applicable doctrine making the Government immune from interest. It cites *United States* v. *Goltra*, 312 U.S. 203, 207, where it is said that Section 2516 (a), then Section 177 of the Judicial Code, "accords with the traditional immunity of the Government from the burden of interest unless it is specifically agreed upon by contract or imposed by legislation." It cites *United States* v. *New York Rayon Co.*, 329 U.S. 654, and *Albrecht* v. *United States*, 329 U.S. 599, indicating the Supreme Court's adherence to the view that the Government need not pay interest.
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> If it were not for these emphatic expressions of the Supreme Court, we would be inclined to think that such a departure from fair and honorable deal-

> ing as is shown by the Government's failure, for some forty-seven years, to pay a definite sum which it had agreed to pay, would require it to compensate the plaintiffs by paying it interest. In deference to the views of the Supreme Court, we do not so decide.
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> * * * *

In the instant case, as the court stated in its opinion of July 17, 1964, *supra*, the Act of 1904, in requiring that the tribes bear the expense of surveying, violated the provisions of the Treaty of 1855 but, notwithstanding sematic difficulties which might appear by the use of the words "thus taking rights away from plaintiffs," it is clear that the violation of the provisions of the treaty did not, under the decided cases, constitute a "taking" within the meaning of the Fifth Amendment so as to entitle plaintiffs to interest.

Plaintiffs' motion of April 23, 1965, is accordingly denied. Recommendation for the amount of recovery, if any, under the outstanding order of reference from the court, is being held in abeyance pending disposition of other claims in the petition and offsets.

RICHARD ARENS, Commissioner.

APPENDIX G

IN THE UNITED STATES COURT OF CLAIMS

No. 50233

(Decided May 13, 1966)

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA

v.

THE UNITED STATES

John W. Cragun, attorney of record, and *Richard A. Baenen* for the plaintiffs. *Wilkinson, Cragun & Barker*, of counsel.

John D. Sullivan, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS and COLLINS, *Judges*.

ON PLAINTIFFS' MOTION TO ENTER FINDINGS OF FACT AS TO AMOUNT OF RECOVERY ON CLAIM PLEADED IN PARAGRAPH 11 OF THE PETITION

DAVIS, *Judge*, delivered the opinion of the court:

In *Confederated Salish and Kootenai Tribes v. United States*, 167 Ct. Cl. 405 (1964), we held that plaintiffs should prevail on their claim (in paragraph 11 of the

petition in this multiclaim suit) that the Government wrongfully used a large amount of their money to pay the expenses of surveying the reservation lands under the Act of April 23, 1904, 33 Stat. 302, which directed that these lands be surveyed into lots and the surveying costs paid out of the receipts of the sales of reservation land found to be surplus. We concluded that, under the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975, the Government should have borne that expense itself, and that by debiting the funds available to the Indians the 1904 Act violated the treaty, "thus taking rights away from plaintiffs." Plaintiffs' motion for summary judgment on this claim was granted, and judgment was entered for them, with the amount of recovery to be determined under Rule 47(c)(2).

In the proceedings under Rule 47(c), it was agreed that the expenditures and disbursements charged against the receipts from the surplus tribal lands amounted to $190,399.97. The present controversy is whether the plaintiffs can also demand interest on that sum.[1] They say that the use of their money, as required by the 1904 Act, amounted to an eminent domain taking which entitled them, under the usual rule, to interest on the principal amount; alternatively, they claim a special statutory basis for interest in this case. The defendant denies both aspects of the demand. The trial commissioner rejected all interest and upheld the Government's defense. Plaintiffs ask us to overturn that refusal.

For many decades Congress has forbidden interest on a plaintiff's claim in this court unless a contract or a statute has "expressly" provided for interest. 28 U.S.C. § 2516(a). This rule has won strict adherence in many kinds of cases, including Indian claims. *Tillson* v. *United States*, 100 U.S. 43 (1879); *United States* v. *North Amer-*

[1] Interest would add up, plaintiffs allege, to over $450,000 (besides the $190,000 principal sum).

ican Transp. Co., 253 U.S. 330, 336 (1920); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947); *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654 (1947); *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951); *Loyal Band of Creek Indians* v. *United States*, 118 Ct. Cl. 373, 382-83, 97 F. Supp. 426, 431 (1951), *cert. denied*, 342 U.S. 813. Plaintiffs seek to come within the implied exception for a Fifth Amendment taking leading to the payment of "just compensation" (*United States* v. *Thayer-West Point Hotel Co.*, *supra*, 329 U.S. at 588; *United States* v. *Alcea Band of Tillamooks*, *supra*, 341 U.S. at 49), but we agree with the trial commissioner that there was no taking here.

As stated in the petition,[2] plaintiffs' claim avers the wrongful and unlawful appropriation, use, and expenditure of Indian money to pay for the survey, and asks for damages in the amount so used. There is no reference to the Fifth Amendment or to an eminent domain taking, nor is there a request for interest in addition to the amount so "appropriated, used and expended." The original motion for summary judgment did not characterize the claim as for a Fifth Amendment taking or seek interest. Similarly, this court's prior opinion did not hold that there had been a Fifth Amendment seizure of property. The gravamen of our ruling was that, by passing the 1904 Act, Congress violated the United States' obligations and the plaintiffs' rights under the 1855 treaty. This was a breach of an agreement—and the court's reference to "thus taking rights away from plaintiffs" was directly

[2] Paragraph 11, the only one pertaining to this particular claim, was as follows: "The defendant wrongfully and unlawfully appropriated, used and expended several hundred-thousand dollars of plaintiff's funds to pay the expenses of survey, classification, appraisal and opening of the reservation lands pursuant to the Act of April 23, 1904 and amendments thereto, the exact amount of which is unknown to plaintiff and will be disclosed by the accounting herein prayed for. Plaintiff is entitled to judgment for damages against defendant for said amount."

connected with the holding that the treaty-agreement's provisions had been broken. The taking away of *contractual rights*, via a rupture of the contract, is of course not equivalent to a taking of *property* under the Fifth Amendment. It is commonplace for the defendant to be held in this court for having gone back on a promise and thus denied a plaintiff his rights. Interest is not paid on an award of that kind for a breach of contract. *Choctaw Nation* v. *United States*, 91 Ct. Cl. 320, 402-03 (1940), *cert. denied*, 312 U.S. 695 (1941).[3] Such is the claim on which we entered judgment in 167 Ct. Cl. 405. As did the Supreme Court in *Alcea Band of Tillamooks*, *supra*, 341 U.S. at 49, we have looked to our former opinion to see whether it was grounded on a taking under the Fifth Amendment, and we find that it was not.

It is put to us, however, that the use of the plaintiffs' own trust funds, as required by the 1904 Act, necessarily amounted to a Fifth Amendment taking of that property, *i.e.*, the funds. Even on the technical level, the flaw in this argument is that legal title to the funds on deposit in the Treasury lay in the United States. See 25 U.S.C. § 161, discussed *infra*. The Indians' interest was, at most, that of a beneficiary, and a trustee's failure to live up to the standards imposed upon him is not a taking of title

[3] In *Choctaw Nation*, a treaty required that five percent interest be paid on certain Choctaw trust funds; Congress thereafter reduced the interest to three percent. This court held the Choctaws entitled to the difference between interest at five percent as provided in the treaty and the three percent specified in the later act, but refused to allow interest on that amount (91 Ct. Cl. at 346-47, 402-03): "Inasmuch, therefore, as plaintiff's right to recover this amount grows out of a contract obligation of the government and results from its failure to fulfill its obligation in that regard, no additional amount measured by interest is allowable as a part of just compensation for a taking of property under the Fifth Amendment. Failure to pay the stipulated interest was not a taking of property under the Constitution." See, also, *Rogue River Tribe of Indians* v. *United States*, 105 Ct. Cl. 495, 552-53, 64 F. Supp. 339, 344 (1946).

from the cestui but a breach of obligation. There is also a deeper objection. Money in the federal treasury, even on deposit, cannot be simply equated with private property. Where such funds are involved it requires extraordinary circumstances, not present here, to find an eminent domain taking in a withholding or use of the money by the Federal Government. If plaintiffs' theory were correct, the label of "taking" would fortuitously be given to those deprivations in which the claimant could show some sort of title to funds in the treasury, while other claimants (with comparable demands) who are owed money by the Government but have been deprived of it would have to content themselves with the lesser remedy available to those who are merely creditors, grantees, obligees, contractors, or beneficiaries of the Government. If, for instance, Congress had happened to provide that the survey expenses were to be deducted from other moneys *appropriated* for plaintiffs' purposes (rather than from the proceeds of the sale of surplus reservation lands)—see, *e.g.*, 29 Stat. 357 (1896)—plaintiffs would not characterize that deduction as a taking of their property and yet the effect of the reduction in funds would be precisely the same. Mere form sometimes has meaning, but usually not where, as here, the choice of form seems haphazard and accidental. Considerations like these have impelled courts to shy away, generally, from designating the withholding or diverting by the defendant of funds in the treasury as an eminent domain taking. *Cf.*, *e.g.*, *United States* v. *N.Y. Rayon Importing Co.*, *supra*, 329 U.S. at 659 *ff.* (1947); *Choctaw Nation* v. *United States*, *supra*, 91 Ct. Cl. at 403; *Acme Process Equipment Co.* v. *United States*, 171 Ct. Cl. ——, ——, 347 F. 2d 509, 537 (June 1965). We see no reason to treat the present claim differently.

Plaintiffs' secondary point is that interest is authorized in this instance by statute. There is no interest provision in the jurisdictional act permitting the suit to be

brought (Act of July 30, 1946, 60 Stat. 715), but we are directed to the Act of April 1, 1880, 21 Stat. 70, 25 U.S.C. § 161, which calls upon the Secretary of the Interior to deposit in the treasury "all sums received on account of sales of Indian trust lands" (among other funds) and declares that interest shall be paid on these deposits. This statutory obligation to pay interest, plaintiffs contend, is a sufficient predicate for an award of interest since the moneys diverted from the treasury by the 1904 Act would have borne interest if they had been allowed to remain undisturbed. We cannot accept this argument, appealing though it is, because the 1904 statute must be read as a *pro tanto* modification of the provisions of the 1880 Act requiring the deposit of "*all* sums received on account of sales of Indian trust lands" (emphasis added). When Congress said, in 1904, that the sale proceeds should be devoted to Indian purposes *after* deduction of the survey expenses,[4] Congress necessarily changed the prior requirement of the 1880 law and directed that interest not accrue on the amounts assignable to those costs. This was a Congressional change, not a mere executive or

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[4] Section 14 of the 1904 Act provided (33 Stat. 305): "SEC. 14. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this Act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect."

administrative order, and the 1880 provision could no longer be given full effect.

Plaintiffs' motion to find them entitled t[o] interest is denied, and the case is returned to the trial commissioner for further proceedings.